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Supreme Court, U.S.
FILED

NO. 07-1257 FEB 4 - 2008

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP H. FRAZIER-PETITIONER, IN PRO SE

vs.

US AIRWAYS, et al.,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 06-2200

PHILLIP H. FRAZIER
222 J. Street, # 426
SAN DIEGO, CALIFORNIA 92101-6825
(619) 696-6922 ext. 426

QUESTION PRESENTED

The questions presented are:

1. Whether the Chapter 11 debtor-employer who intentionally and willfully and falsely files a false SUGGESTION OF BANKRUPTCY in state court is entitled to summary judgment and discharge.
2. Whether the Chapter 11 debtor-employer who intentionally and willfully and falsely files a false SUGGESTION OF BANKRUPTCY in state court preventing the creditor-employee from pursing state discrimination work-related injury causes of actions in state court violated the creditor-employee's V11 AMENDMENT rights under the Constitution of The United States Of America.
3. Whether the Chapter 11 debtor-employer

who intentionally and willfully and falsely files a false SUGGESTION OF BANKRUPTCY in state court constitutes UNCLEAN HANDS.

4. Whether the creditor-employee Appellant can set forth the UNCLEAN HANDS DOCTRINE on appeal any time prior to filing a petition for a writ of certiorari.

5. Whether the creditor-employee's June 27, 2003 EEOC complaint clearly set forth post-confirmation allegations, and was not vague as the Reorganized debtors-employer set forth.

6. Whether the EEOC finding of "reasonable cause" to conclude that the contempt motion was filed in retaliation for the creditor-employee's

filing of the EEOC complaint; is sufficient evidence , probative to create a genuine issue of material fact about the Reorganized debtors-employer intent to discriminate, to avoid summary judgment.

7. Whether the Reorganized debtors-employer were unreasonable in filing the Motion for Contempt and Sanctions against the creditor-employee on the basis that the EEOC complaint was vague.

8. Whether the Reorganized debtors-employer were unreasonable in filing the Motion for Contempt and Sanctions against the creditor-employee on the basis that the Reorganized debtors-employer were protecting the Re-organized debtors-employer estate, when the evidence proves that the EEOC

complaint set forth only post-confirmation allegations.

9. Whether the Reorganized debtors-employer were unreasonable in filing the Motion for Contempt and Sanctions against the creditor-employee on the basis that the creditor-employee violated the plan injunction.

10. Whether the Reorganized debtors-employer's past falsity setting forth that the creditor-employee had undergone left knee surgery, when the evidence proves that the creditor-employee had not undergone left knee surgery, which give rise to the Re-organized debtors-employer's pro-pensity for untruthfulness, and that their reasons for filing the Motion

for Contempt and Sanctions are pre-textual and should not be believed.

11. Whether the Chapter 11 debtors-employer filing of a false SUGGESTION OF BANKRUPTCY in state court give rise to the Reorganized debtors-employer's propensity for untruthfulness.

12. Whether the Chapter 11 debtors-employer's falsely setting forth that a part-time operations position was open at the creditors-employee's work place was available, when the evidence proves that there was no operations part-time position available, proving the Chapter 11 debtors-employer's propensity for untruthfulness.

13. Whether the Reorganized-employer's reasons for filing the Motion for Contempt and Sanctions against the

creditor-employee was pretextual and constituted retaliation against the creditor-employee for filing the June 27, 2003 EEOC complaint; thus precluding summary judgment.

14. Whether creditor-employee plaintiff need only show by a preponderance of the evidence (now referred to as "more likely than not") that the Reorganized-debtor's employer reasons for filing the Motion for Sanctions and Contempt against the creditor-employee was pretextual and untruthful precluding summary judgment.

15. Whether civil malicious prosecution can can constitute adverse employment action sufficient to violate Title V11, Civil Rights Act of 1964 § 701 et seq., as amended, 42 U.S.C.A.

§ 2000 et seq., precluding summary judgment.

16. Whether the Reorganized-debtors employer's conduct in filing the Motion for Contempt and Sanctions against the creditor-employee was (1) intentional and reckless: (2) the conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality; (3) the conduct caused the emotional distress; and (4) the emotional distress does not have to be severe, only that the emotional distress was caused by the Reorganized debtors-employer's conduct which was wrong and unlawful and violated Title V11 retaliation statute 42 U.S.C. 2000 (e)

et seq.

17. Whether the creditor-employee had made out a prima facie case of retaliation by the Reorganized-debtor's employer precluding summary judgment.
18. Whether the creditor-employee had made out a prima facie case of malicious prosecution by the Reorganized-debtor employer precluding summary judgment.
19. Whether the creditor-employee had made out a prima facie case of intentional infliction of emotional distress by the Reorganized-debtor's employer precluding summary judgment.
20. Whether the creditor-employee need special damages, special loss or unusual hardship resulting from malicious prosecution by the Reorganized-debtor's wrong conduct; and

and is the Reorganized-debtor's wrongful conduct sufficient enough to prove that the malicious prosecution by the Reorganized-debtor's employer indeed occurred.

PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

September 12, 2007 was the date that the United States Court of Appeals For The Fourth Circuit affirmed the judgment of the District Court For The Eastern District of Virginia, at Alexandria.

December 04, 2007 was the date that the Honorable Chief Justice John Roberts of this Court extended the time to February 09, 2008 which to file a petition for a writ of certiorari after being presented with my application for an extension of time which to file a petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, AMENDMENT VII, which reads in relevant part as follows: "[Section 1.] In suits at common law, where value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Proposed September 25, 1789; ratified December 15, 1971.
2. The Civil Rights Act of 1964 § 701 et seq., as amended, 42 U.S.CA. § 2000e et seq., which reads in relevant part as follows: "It is unlawful for any employer to

discriminate against an employee in retaliation for engaging in a protected activity."

STATEMENT OF THE CASE

This case involves summary judgment which was granted to US AIRWAYS on the grounds that US AIRWAYS did not commit intentional emotional distress, malicious prosecution and retaliation against the appellant and creditor-employee for filing a Motion for Contempt and Sanctions.

The appellant and creditor-employee disagrees. The appellant and creditor-employee alleges that the lower courts committed reversible error in granting summary judgment to US AIRWAYS, and this High Court's intervention is required to meet the ends of justice.

The courts in the first instance are; The United States Bankruptcy Court, Alexandria, Virginia; The District Court,

Alexandria, Virginia; and the Fourth Circuit of Appeals, Richmond, Virginia.

Further, The Fourth Circuit opinion was set forth as a PER CURIAM OPINION.

REASONS FOR GRANTING THE PETITION

1. Important questions involving Title V11 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 (e) et seq., is required, and intervention from this High Court is requested and required.
2. Whether summary judgment is appropriate when the Corporate-debtor-employer-Reorganized-debtor-employer, intentionally and willfully files a false SUGGESTION OF BANKRUPTCY in state court.
3. The Petitioner attempted to engage the EEOC in San Diego, California, where the Petitioner filed the complaint at issue, requesting the EEOC to intervene and file a writ of certiorari on behalf of the Petitioner.

However; the EEOC'S position in San Diego, California, after consulting with the legal department of the EEOC in Los Angeles, California was that the EEOC primarily will intervene with preparing writs of certiorari when the issues involve class actions parties. Additionally, the Petitioner attempted to engage several attorneys in San Diego, California to take the case, with no success. Therefore, The Petitioner respectfully request of this High Court to grant the Petitioner's petition involving important civil rights issues.

4. FURTHER, please See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 which provides in pertinent

part: "Credibility determinations, the weighting of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a direct verdict."

5. FURTHER, please See Berry v. Stevinson Chevrolet 74 F.3d 980, 981 which provides in pertinent part: "Malicious prosecution can constitute adverse employment action sufficient to violate Title V11, Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000(e) et seq."

6. FURTHER, please See Harris v. Procter & Gamble Cellulose Co., 73 F.3d 321, 324 which provides

in pertinent part: "However, threats arising in an employer-employee relationship involves a "captive victim whom may fear reprisal for complaining," such that "a reasonable person could find the conduct outrageous and egregious" and thereby claim intentional infliction of emotional distress."

7. FURTHER, please See Perkins v. School Bd. of Pinellas County 902 F.Supp. 1503, 1504 which provides in pertinent part: "To avoid summary judgment in employment discrimination case, plaintiff need not show by preponderance of the evidence that employer's articulated

reasons were pretext; rather, plaintiffs burden at summary judgment is met by introducing evidence which could form basis for finding of facts, which when taken in light most favorable to non-moving party, could allow jury to find by preponderance of the evidence that plaintiff has established pretext, and in cases of retaliation, that the action taken was in retaliation for engaging in a protected activity. "

8. FURTHER, please See Roger Reeves v. Sanderson Plumbing Products, Inc., 530,133 which provides in pertinent part: "by showing that the employer's proffered explanation is unworthy of credence." "Proof that the defendant's

explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." id. Reeves continues: "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Thus, a plaintiff's prima facie case, combined with sufficient evidence to find

that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." id.

9. FURTHER. please See, Blacks Law Dictionary, 8th Edition, Copyright 2004, which provides in pertinent part: "per curiam opinion. An opinion handed down by an appellate court without identifying the individual judge, who wrote the opinion.-Sometimes shortened to per curiam. "The most controversial form of summary disposition is a per curiam opinion that simultaneously grants certiorari and disposes of the merits as some length, discussing both the facts and the issues involved. The

result is usually a reversal of the judgment below.... The parties are given no opportunity to file briefs on the merits or to argue orally before the Court. Indeed, they are given no formal notice whatever of the Court's intention to dispose of the certiorari papers in this manner.... "Robert L. Stern et al., Supreme Court Pratice 320 (8th ed. 2002).

JUDGMENT

FILED: September 12, 2007

UNITED STATES COURT OF APPEALS

FOR THE

Fourth Circuit

No. 06-2200

1:06-cv-00534-LMB

BK.-04-13819-SSM

AP -05-01131-SSM

In re: US AIRWAYS, INCORPORATED

Debtor

PHILLIP H. FRAZIER

Plaintiff-Appellant

v.

US AIRWAYS, INCORPORATED

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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APPENDIX 1

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
Clerk.

PER CURIAM:

Phillip H. Frazier appeals the district court's order affirming the bankruptcy court's order granting summary judgment in favor of US AIRWAYS, Inc., on his claims alleging retaliation, malicious prosecution, and intentional infliction of emotional distress. We have reviewed the record and find no

reversible error. Accordingly, we affirm for the reasons stated by the district court. Frazier v. US Airways, Inc., Nos. 1:06-cv-00534-LMB; Bk-04-13819-SSM; AP-05-01131-SSM (E.D. Va. filed Oct.3, 2006 & entered Oct. 04, 2006; March 28, 2006). We dispense with oral argument because the facts and legal contentions are adequately present in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re:	)	
US AIRWAYS, INC. et al.,	)	1;06cv534
Reorganized Debtors.	)	Case No.
PHILLIP H. FRAZIER,	)	04-13819-
Appellant,	)	SSM
v.	)	Chapter 11
US AIRWAYS, INC.,	)	
Appellee.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the decision of the bankruptcy court be and is AFFIRMED.

To appeal this decision, A Notice of Appeal must be filed with the Clerk

of this Court within 30 days of receipt of this Order.

The Clerk is directed to forward copies of this Order to counsel of record and to the pro se appellant, Phillip H. Frazier.

Entered this 3rd day of October, 2006.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re:	)
US AIRWAYS, INC. et al.,	)
Reorganized Debtors.	) 1:06cv534
PHILLIP H. FRAZIER,	) Case No.
Appellant,	) 04-13819-
v.	) SSM
US AIRWAYS, INC.,	) Jointly
Appellee.	) Adminis-
	) tered
	Chapter 11

MEMORANDUM OPINION

Before the Court is the appeal of Phillip H. Frazier("Frazier") of the decision of the United States bankruptcy court granting summary

judgment in favor of US AIRWAYS, Inc. ("US AIRWAYS") on Frazier's claim for $9.06 million, which was based on allegations that a contempt motion filed against Frazier by US AIRWAYS in a chapter 11 proceeding constituted unlawful retaliation, malicious prosecution, and intentional infliction of emotional distress.

The bankruptcy court found that Frazier failed to forecast sufficient evidence to rebut US AIRWAYS legitimate , non-retaliatory reasons for filing the contempt motion. That finding was fully supported by the record and will not be disturbed.
Accordingly, this Court will affirm the decision of the bankruptcy court.

1. Background and Procedural History

Frazier and US AIRWAYS have engaged in several rounds of litigation in the bankruptcy court, the filings for which fill several volumes. A brief history of this litigation is set forth below.

A. Employment History

Frazier began working for US AIRWAYS in 1973 and has held a number of positions involving passenger service and flight operations throughout his employment. From 1990 until 2001 he was employed as a fleet service agent in the operations section. His employment was without incident until July 2, 1999, when he sustained an injury to his ankle while offloading baggage from an airplane. That injury limited his

ability to do heavy lifting. Although diagnosed with an ankle strain, Frazier suffered from chronic ankle problems through at least July 2003. He went on limited duty at least twice during this time.

In the spring of 2001, Frazier submitted a formal request to US AIRWAYS for a reasonable accommodation to his job as a fleet service agent. US AIRWAYS denied this request, finding that Frazier could not perform the essential functions of his job and therefore was not entitled to an accommodation. In the summer of 2001, having exhausted all of his accrued vacation time and sick time, Frazier was placed on an unpaid medical leave of absence.

B. Litigation History

There are three separate timelines of litigation between there two parties. The first involves Frazier's initial claim against US AIRWAYS, which was filed a proof of claim during US AIRWAYS first bankruptcy proceeding ("first proof of claim"). This timeline begins in 2002 and ends in 2006. The second involves Frazier's filing of a charge with the Equal Employment Opportunity Commission ("EEOC"), an event that occurred after the filing of the first proof of claim but before the proof of claim was litigated on the merits ("EEOC complaint"). This timeline begins in 2003 and ends in 2004. The third and final timeline involves Frazier's second proof of claim against

US AIRWAYS, which occurred during US AIRWAYS second bankruptcy proceeding ("second proof of claim"). This timeline begins in 2005; this second proof of claim is at issue in this appeal.

1. The First Proof of Claim

After US AIRWAYS and six affiliates filed a chapter 11 petition in the bankruptcy court on August 11, 2002, the bankruptcy court began accepting proofs of claim. On October 31, 2002, approximately two months after US AIRWAYS filed its petition and 17 months after he was placed on unpaid medical leave, Frazier filed his first proof of claim against US AIRWAYS alleging that it discriminated against him on the basis of his disability in violation of the Americans with Dis-

abilities Act ("ADA"), 29 U.S.C. § 12203 (a)-(b), and California Fair Employment and Housing Act. He based this claim on US AIRWAY'S failure to accommodate his disability by altering his job as a fleet service agent so that he could perform it. He initially sought $126,377.88 in damages, but later tried to file two more identical proofs of claim on these charges, amending his damages demand to $24 million. These amendments were denied by the bankruptcy court.

On March 18, 2003, the bankruptcy court confirmed the reorganization plan in the chapter 11 proceeding. Frazier's first bankruptcy court granted summary judgment to US AIRWAY'S after finding that Frazier was not protected by the ADA because his ankle injury and its result-

ing limitations did not amount to the type of physical impairment the ADA covers. Preserved for trial was the issue of whether US AIRWAY'S did maintained a "100 % healed" policy that would be a per se violation of the ADA.

At trial, the bankruptcy court found that Frazier lacked standing to challenge the alleged "100 % healed" policy because of its earlier finding that Frazier was not protected by the ADA. In alternative, the bankruptcy court found that the evidence regarding the existence of a "100 % healed" policy was in equipoise at best, and therefore Frazier did not meet his burden of proving a violation of the ADA on that issue. The bankruptcy court's decisions were fully affirmed

by the district court and Frazier's further appeal to the Fourth Circuit was dismissed. Frazier v. US AIRWAY'S Group, Inc., No.04-2143 (4th Cir. April 18, 2006) (per curiam) reh'g en banc denied (May 31, 2006).

2. The EEOC Complaint

In February 2003, before the plan was confirmed and while his first proof of claim was pending in the bankruptcy court, Frazier sought relief from the automatic stay imposed by the bankruptcy proceedings to pursue various discrimination claims in state court. The bankruptcy court did not immediately rule on Frazier's motion for relief. However, on March 18, 2003 , as part of its confirmation of the chapter 11 plan, the bankruptcy court imposed a discharge

injunction which barred pursuit of all pre-petition claims. In May 2003, the bankruptcy court heard arguments on Frazier's motion for relief from the discharge injunction. In its Memorandum Opinion, the bankruptcy court denied the motion after concluding that Frazier had failed to establish cause to grant relief from the discharge injunction to allow him to litigate his pre-confirmation employment discrimination claims in state court.

Frazier did not appeal that decision, however, on June 27, 2003, he filed a complaint with the EEOC alleging discrimination claims against US AIRWAY'S based on race, age, disability, and retaliation with regard to actions occurring between March 31,

2003, and June 26. 2003. [1]

US AIRWAY'S notified Frazier that the EEOC complaint was filed in violation of the discharge injunction and asked him to withdraw it. At the same time, US AIRWAY'S notified the EEOC that it would not respond to Frazier's complaint because the complaint violated the discharge injunction. When Frazier did not withdraw his complaint, US AIRWAY'S filed a Motion for Contempt and Sanctions in the bankruptcy court.

The bankruptcy court held a hearing on the contempt motion on October 23, 2003, during which US AIRWAY'S argued that the EEOC complaint was based on

[1] The narrative statement included on

the same underlying facts and allegations as the proof of claim pending in the bankruptcy court, despite Frazier attributing March 31, 2003 as the starting date for the acts of discrimination and retaliation. In particular, US AIRWAYS pointed out that no further action had occurred between Frazier and US AIRWAYS since his first proof of claim was filed,

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the EEOC claim form is vague, and the only specific action US AIRWAYS is alleged to have taken is to have denied reinstatement based on a 100 % healed policy.

he was still on medical leave.

The bankruptcy court, however, found that although the EEOC complaint "mirrored" the allegations in the first proof of claim, it could be construed as legally distinct from the original claim because it limited itself to post-confirmation dates and alleged a continued refusal to reinstate Frazier. The bankruptcy court warned Frazier not to resurrect any of his pre-confirmation claims, but concluded that Frazier had not yet violated the injunction. US AIRWAYS withdrew the contempt motion at the hearing. With the contempt motion withdrawn, the parties proceeded to

litigate Frazier's first proof of claim, which, as previously discussed, was resolved in favor of US AIRWAYS.

However, the EEOC proceeded to investigate Frazier's complaint, and on July 1, 2004, it issued its Determination in response to the claim filed in June 2003. The Determination found reasonable cause to believe Frazier's allegations. [2] A Right to Sue Letter was issued on July 22, 2004.

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[2] Specifically, it wrote, "Examination of the evidence reveals reasonable cause to believe that Charging Party was retaliated against based upon his protected activity in violation of Title V11, the ADEA, and the ADA. "

3. The Second Proof of Claim

On September 12, 2004, US AIRWAYS filed a new petition for bankruptcy protection under Chapter 11. [3]Frazier filed a new complaint in the bankruptcy curt on January 28, 2005. That complaint was treated as a proof of claim in the second bankruptcy proceeding. In this second proof of claim, Frazier sought $9 million in damages for discrimination and retaliation involving the same underlying facts and allegations as the first proof of claim, including claims for violation

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[3] By this time, Frazier had returned to work at US AIRWAYS. The plan of reorganization in the second bankruptcy case was confirmed on July 28, 2005.

of the ADA, and the California Fair Employment and Housing Act, a claim of retaliation under Title V11 of the Civil Rights Act of 1964 as amended (29 U.S.C. § 2000e-3 (a), and claims for intentional infliction of emotional distress and malicious use of process. US AIRWAYS objected to the claim as the bankruptcy proceeding continued through 2005.

Several months later, Frazier requested a stipulation from US AIRWAYS permitting him to file an amended complaint, which he did on October 28, 2005. In his amended complaint, Frazier abandoned all claims regarding disability, race, and age discrimination and reinstatement, leaving

only claims of retaliation under Title V11, intentional inflicition of emotional distress, and malicious use of process, all based on US AIRWAYS filing the Motion for Contempt and Sanctions in the first bankruptcy proceedings.

In November 2005, both Frazier and US AIRWAYS filed for summary judgment on the Amended Complaint. The motions were fully briefed, and argued in December 2005. In March 2006 the bankruptcy court issued an Order and Memorandum Opinion granting summary judgment to US AIRWAYS. Frazier timely appealed this decision to this Court.

11. Discussion

A. Standard of Review

A bankruptcy court's findings of fact may only be set aside by a district court exercising appellate review if they are clearly erroneous. Fed. R. Bankr. P. 8013. A District Court's review of legal conclusions and mixed questions of law and fact, however, are de novo. In re Johnson, 960 F.2d 396, 399 (4th Cir. 1992).

Motions for summary judgment raise mixed questions of law and fact. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c), Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1985). In ruling on a

motion for summary judgment, a court should believe the evidence of the nonmovant, and all justifiable inferences must be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

1. Retaliation

Lacking any direct evidence of retaliation, in analyzing whether Frazier has made a sufficient claim for retaliation, the McDonell Douglas burden shifting framework is the appropriate test. Under that framework, Frazier must first make a prima facie case by showing that (1) he engaged in a protected activity; (2) US AIRWAYS took an adverse employment action against him; and (3) a causal connection existed between the protected activity

and the asserted adverse action. Tinsey v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998). Specifically, if Frazier is able to show that the filing of the EEOC complaint triggered an adverse employment action, a prima facie case would be made and the burden then shifts to US AIRWAYS to articulate a legitimate, non-retaliatory reason for its action. If US AIRWAYS carries this burden, then to overcome summary judgment Frazier must present some evidence that the company's proffered explanation is merely a pretext for retaliation.

Frazier clearly engaged in a protected activity and in direct response to that protected activity,

the defendant filed its contempt motion. An employer's filing of a contempt motion in litigation relating to a legitimate discrimination claim brought by an employee may not actually effect the terms and conditions of emplcyment, but it may constitute an "adverse employment action." See Burlington Northern and Sante Fe Ry. Co. v. White, 126 S.CT. 2405, 2411 (2006) (holding that application of the retaliation provision of Title V11 is not limited to an employer's actions that effect the terms, conditions, or status of employment, or those that occur at the workplace, because, the Court concluded, the scope of the retaliation provision is

INTENTIONALLY

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broader than that of Title V11'S substantive discrimination provision).

Broadly construing the adverse employment action, the bankruptcy court correctly found that Frazier had made out a prima facie case of retaliation by US AIRWAYS.

However, the bankruptcy court also found that US AIRWAYS presented a legitimate, non-retaliatory reasons for its action; namely, that it sought to protect the debtor's estate against what it reasonably believed to be a violation of the discharge injunction issued by the bankruptcy court. [4] Although the

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[4] That injunction barred "all Person (from) commencing or continuing in any manner any Claim, action, or

contempt motion was dismissed after US AIRWAYS withdrew it, given Frazier's demonstrated tendency to file unreasonable multi-million dollar claims, US AIRWAYS effort to protect itself was reasonable. The pattern of litigation between these two parties buttresses the bankruptcy court's conclusion that US AIRWAYS response to the filing of the EEOC complaint was justified.

other proceeding of any kind with respect to any Claim...against Reorganized Group or any other Reorganized Debtor, which they possessed or may posses prior to the Effective Date...." In re US AIRWAYS Group, Inc., No. 02-83984-SSM (Bankr. E.D. Va., Mar. 18 2003), Order of Confirmation at 35; sec. 524 (a) (2), Bankruptcy Code

With that finding, the burden shifted back to Frazier to produce evidence that US AIRWAYS proffered explanation was really a pretext for retaliation. The record clearly demonstrates that Frazier presented no such evidence. In fact, the only "evidence" asserted by Frazier were his own declarations. Without more, such declarations do not rebut a non-retaliatory explanation. Goldberg v. Green and Co., 836 F.2d 845, 848 (4th Cir. 1988).

Frazier tried to rely on the EEOC finding of "reasonable cause" to conclude that the contempt motion was filed in retaliation for his EEOC complaint. Reliance on on EEOC

administrative finding has been held by the Fourth Circuit to be insufficient evidence to avoid summary judgment. Goldberg, 836 F.2d at 848 (an EEOC finding is not "sufficiently prohative to create a genuine issue of material fact about (the Company's) intent to discriminate").

Because Frazier failed to present any evidence other than his own assertions that the explanation given by US AIRWAYS for filing the contempt motion was pretextual, Frazier failed to establish a dispute over a genuine issue of material fact. US AIRWAYS was entitled as a matter of law to summary judgment on the retaliation claim.

2. Malicious Prosecution

Given the specific allegations

in the second proof of claim, the bankruptcy court correctly construed them under Virginia law as claims of malicious prosecution and intentional infliction of emotional distress. [5]

To establish a prima facie case of malicious prosecution under Virginia law, a plaintiff must prove that (1) the defendant instituted a prior proceeding against the plaintiff; (2) the proceeding was instituted without probable cause; (3) the proceeding was instituted with malice; (4) the

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[5] Frazier did not dispute the bankruptcy court's interpretation of his claim this way and in fact adopted recharacterization of his claim in his opening brief. See Appellant's Opening Brief at 5.

underlying proceeding terminate in the plaintiff's favor; and (5) the plaintiff sustained special damages as a result of the proceeding. To-Mai-Minoque v. State Farm Mut. Auto Ins. Co., 770 F.2d 1228, 1236-37 (4 th Cir. 1985).

As the bankruptcy court found, US AIRWAYS had probable cause to file the motion for contempt, even though the motion was ultimately resolved in Frazier's favor. The vague nature of Frazier's EEOC complaint reasonably led US AIRWAYS to believe that the discharge injunction may have been violated. Frazier's extensive litigation bolsters the finding of the bankruptcy court that US AIRWAYS was

justified in its belief that the debtor's estate needed to be protected. Further, Frazier, has failed to show special damages, defined under Virginia law as "proof of a special loss or unusual hardship resulting from malicious prosecution." Ayyildiz v. Kidd, 220 Va. 1080, 1083 (1980).

Because Frazier failed to point to any evidence that would establish a prima facie case for malicious prosecution, summary judgment for US AIRWAYS was appropriate.

3. Intentional Infliction of Emotional Distress

Frazier's claim for intentional infliction of emotional distress is similarly without merit. The tort of intentional infliction of emotional

distress is "not favored" in Virginia law. See Ruth v. Fletcher, 237 Va. 366, 371 (1989) To establish a prima facie claim of intentional infliction of emotional distress, a plaintiff must show that (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that if offends generally accepted standards of decency and morality; (3) the wrongdoer's conduct caused the emotional distress; and (4) the emotional distress was severe. Womak v. Eldridge, 215 Va. 338, 341 (1974). The effect of the wrongdoer's conduct on the plaintiff must be so severe that no reasonable person could be expected to endure it. See Barrett

v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001).

Frazier has failed to establish that filing a motion for contempt constitutes "outrageous and intolerable" conduct that offends generally accepted standards of decency. He also fails to present evidence of emotional distress of the severity required under Virginia law absent physical injury. See Russo v. White, 241 Va. 23, 28 (1991) ; Ruth, 237 Va. at 373. Frazier has asserted sleepless nights and evidence of depression and stress after being served with the contempt motion. These symptoms do not equate to "severe" emotional distress as required under Virginia law.

Because Frazier has not presented evidence to show that the conduct of US AIRWAYS was outrageous or that any emotional distress caused by the filing of the contempt motion rose to the level of severity required under Virginia law, the bankruptcy court correctly determined that summary judgment should be entered in favor of US AIRWAYS on that claim.

111. Conclusion

For the reasons stated above, the decision of the bankruptcy court will be AFFIRMED.

A separate order consistent with this opinion will be entered.

Entered this 3rd day of October, 2006.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
US AIRWAYS, INC., *et al.*	)	Case No.
	)	04-13819-SSM
Debtors	)	
	)	Chapter 11
PHILIP H. FRAZIER	)	(Jointly
	)	Administered)
Plaintiff	)	
	)	Adversary
vs.	)	Proceeding No.
	)	05-1131
US AIRWAYS, INC.	)	
Defendant		

MEMORANDUM OPINION

This matter before the court on cross-motions for summary judgment. The plaintiff, Phillip H. Frazier, has asserted a $9.06 million claim against the debtor, US Airways, Inc., based upon a contempt motion that the debtor brought against him—he says unjustifiably—in its prior chapter 11 case. The question is whether Mr.

Frazier has forecast sufficient evidence to establish that the bringing of the contempt motion constituted illegal retaliation for filling an employment discrimination complaint, malicious prosecution, or intentional infliction of emotional harm. Because the evidence would not support any of the pleaded causes of action, Mr. Frazier's motion for summary judgment will be denied, the debtor's motion for summary judgment will be granted, and the complaint will be dismissed.

Background

The plaintiff, Phillip H. Frazier, is a long-time employee of the defendant airline, US Airways, Inc. ("US Airways"). US Airways, together with its parent holding company and several affiliates, filed a petition for reorganization under chapter 11 of the Bankruptcy Code in this court on September 12, 2004. This was the company's second chapter 11 filing. It had previously filed a chapter 11 petition in this court on August 11, 2002. A plan was confirmed in the first case on March 18, 2003. Mr. Frazier filed a claim in the first case based on alleged employment

discrimination.[1] After US Airways objected to his claim, he filed a pleading that included a request for relief from the automatic stay to pursue his claim, he filed a pleading that included a request for relief from the automatic stay to pursue his claim in state court. Prior to the hearing on the motion, US Airway's plan was confirmed. The court treated Mr. Frazier's pleading as a motion for relief from the discharge injunction, but denied the motion on the ground that this court was the appropriate forum in which to liquidate the claims. *In re US Airways Group, Inc.*, No. 02-83984-SSM (Bankr. E.D. Va., May 28, 2003). The court did note, however, that there might be some aspect of Mr. Frazier's claim that arose post-confirmation

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[1] As explained in the memorandum opinion granting partial summary judgment against his claim in the first chapter 11 case, Mr. Frazier was employed as a fleet service agent. The functions of a fleet service agent include ramp service, operations/tower, and central load planning. At one point, Mr. Frazier's specific duty assignment included only operations. Later, he was assigned to ramp work, which included the loading of baggage from arriving aircraft. After he injured his ankle, he sought an assignment that did not include ramp work and asserted that the company's refusal to limit his duties to operations work, and its purported enforcement of a "100 percent healed" policy in order to return to work, were violations of the Americans with Disabilities Act. *In re US Airways Group, Inc.*, No. 02-83984-SSM (Bankr. E.D. Va., Feb. 10, 2004).

and was therefore not encompassed by the discharge injunction:

> Mr. Frazier asserts that the debtor has refused to return him to full duty even though he is presently capable of performing the duties of his position. Since his employment, according to the debtor, has not been terminated, Mr. Frazier *might*—an issue the court need not resolve on the present record—have some enforceable right, based on his present status, to reinstatement. If so, such a right—which would simply require the debtor to treat Mr. Frazier as it is legally required to treat any other current employee—would not be encompassed by the discharge and could be pursued without violation of the discharge injunction.

Id. at 9-10 (internal citation omitted). In any event, Mr. Frazier subsequently filed an EEOC complaint in California in June 2003 asserting discrimination claims that mirrored the claims that he had filed in this court. US Airways responded first by sending Mr. Frazier a letter demanding that he withdraw the complaint because it violated the discharge injunction; and, when he did not do so, by filing a motion in August 2003 to have him held in civil contempt for violation of the discharge injunction.

A hearing on the contempt motion was held on October 23, 2003, with Mr. Frazier participating

by telephone. During the hearing, the court expressed doubt that the EEOC complaint necessarily violated the discharge injunction. Although the court agreed that the claims resembled, and could be read as embracing, those that had been asserted in Mr. Frazier's proof of claim, they could also be read more narrowly to allege only post-confirmation discrimination.[2] US Airways's counsel, perhaps perceiving which way the wind was blowing, then withdrew the contempt motion. After a trial held in this court in February 2004, Mr. Frazier's underlying discrimination claims were disallowed.

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[2] In a written order dismissing the show cause motion without prejudice, the court explained its thinking as follows:

> [T]he filed charge could reasonably be read as asserting only claims based on post-confirmation acts. As so limited, its prosecution would not violate the discharge injunction, since the issue is not whether Mr. Frazier was or was not improperly placed into a leave without pay status, but whether he is now qualified to return to duty. Of course, to the extent that Mr. Frazier, while ostensibly prosecuting a post-confirmation claim, attempts to resurrect or assert his pre-confirmation claim, such action would violate the discharge injunction and would subject Mr. Frazier to sanctions for contempt. At this point, however, the court cannot find that Mr. Frazier has crossed the line.

In re US Airways Group, Inc., No. 02-82984-SSM (Bankr. E.D. Va., Oct. 2, 2003), Order at 2.

After the second chapter 11 case was filed, Mr. Frazier commenced the present adversary proceeding seeking $9,060,000 in compensatory and punitive damages, as well as reinstatement to his former position, for alleged employment discrimination, intentional infliction of emotional distress, and "malicious use of process." The court stayed the adversary proceeding and ordered that the complaint be treated as a proof of claim.[3] A chapter 11 plan was subsequently confirmed under which allowed claims will receive a pro-rata distribution of stock in the parent holding company, US Airways Group, Inc. Following confirmation of the plan, Mr. Frazier filed an amended complaint, and both Mr. Frazier and the debtor have filed motions for summary judgment.

Discussion

1.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

[3] The claim has been entered on the claims register as Claim No. 3463.

to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1985). In ruling on a motion for summary judgment, a court should believe the evidence of the nonmovant, and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Although Mr. Frazier has pleaded three different causes of action, all of them are grounded in the same act, namely the filing by US Airways of the motion for contempt. The issue on summary judgment is whether Mr. Frazier has forecast evidence sufficient to raise a triable issue that the contempt motion was brought as retaliation for the filing of the EEOC complaint or that the bringing of the motion constituted either malicious prosecution or intentional infliction of emotional distress.

II.

The court will first address the retaliation claim. Mr. Frazier relies upon Title VII of the Civil Rights Act of 1964, as amended, which declares, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The cited section applies in express terms only to actions taken in retaliation for making charge under Title VII. Only a portion of the charge Mr. Frazier filed with the EEOC—namely, that he was discriminated against on account of his race—falls under Title VII. The remainder of the charge alleged discrimination under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). However, each of those acts has its own anti-retaliation provision which does not differ in any material respect from Title VII's.[4]

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[4] The ADEA's prohibition against retaliation provides in relevant part:

> (d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be

On the record before this court, there can be no doubt that US Airways brought the contempt motion *in response* to the EEOC complaint, but that is a different issue from whether the motion constituted unlawful *retaliation*. The answer to that question requires the court to determine, first, whether the bringing of a court proceeding against an employee constitutes "discrimination" within the meaning of the statute; and, if so, whether the contempt motion here was brought without

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> unlawful for an employer to discriminate against any of its employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d). The corresponding prohibition in the ADA is to the same effect:

> (a) Retaliation. No person shall discriminate against any individual because such individual has . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(a) and (b).

apparent justification and primarily for the purpose of punishing Mr. Frazier for having brought an otherwise protected discrimination claim or intimidating him into withdrawing the claim.

A.

In order to establish a *prima facie* case for discriminatory retaliation, Mr. Frazier must show that: (1) he engaged in a protected activity; (2) US Airways took an adverse employment action against him; and (3) a casual connection existed between the protected activity and the asserted adverse action. *Tinsey v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998). Although Mr. Frazier has produced no direct evidence of US Airways's motive for bringing the contempt motion, he may nevertheless meet his initial burden using the framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Specifically, all he need initially show is an adverse action triggered by the filing of the EEOC complaint. At that point, the burden shifts to US Airways to articulate a legitimate, non-retaliatory reason for its action. If US Airways carries this burden, then

Mr. Frazier must show that the company's proffered explanation is merely a pretext for discriminatory retaliation. *See Price v. Thompson*, 380 F.3d 209, 212, (4th Cir. 2004).

B.

As an initial matter, US Airways takes the position that Mr. Frazier cannot establish that the bringing of the contempt motion was an "adverse employment action," since it did not directly affect the terms, conditions, or benefits of employment. However, many courts—including lower courts within the Fourth Circuit—have held that bringing legal action or criminal charges against an employee who makes a charge of discrimination can constitute a prohibited retaliatory act within the meaning of the statute. *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (finding that plaintiff established a *prima facie* case of retaliation by showing: (1) the plaintiff filed an EEOC action; (2) the employer reported a purported forgery and instituted criminal proceedings; and (3) that such adverse action would not have occurred if the plaintiff had not filed an EEOC complaint); *EEOC v. Virginia Carolina*

Veneer Corp., 495 F. Supp. 775 (W.D. Va. 1980), *appeal dism'd sub. Nom. Cassidy v. Virginia Carolina Veneer Corp.*, 652 F.2d 380 (4th Cir. 1981) (finding retaliation where employer filed defamation suit against employee based upon statements the employee made to the EEOC); *Beckham v. Grand Affair, Inc.*, 671 F. Supp. 415 (W.D. N.C. 1987) (finding retaliation where an employer instituted criminal prosecution of former employee who filed a claim with the EEOC).

A narrower view, espoused by the Fifth Circuit, is that only those acts which constitute an "ultimate employment decision" by an employer can form the basis for retaliation liability under Title VII. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997). Consistent with this strict view, the Fifth Circuit has expressed great doubt that "counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis." *Hernandez v. Crawford*, 321 F.3d 528, 532 (5th Cir. 2003) (quoting *Scrivner v.*

Socoro Indep. Sch. Dist., 169 F.3d 969, 972 (5th Cir. 1999)); *see also Glass v. IDS Financial Services, Inc.*, 778 F. Supp. 1029, 1061 n.53 (D. Minn. 1991) ("The court notes . . . that the anti-retaliation provisions of the ADEA and Title VII are designed principally to deal with retaliatory conduct that occurs outside the judicial system, for example: demotion, termination, poor evaluations, and loss of normal work assignment. Anti-retaliation provisions prevent employers from intimidating plaintiffs thereby discouraging plaintiffs from seeking legal remedies. Once a lawsuit has been filed, courts have tools to deal with counterclaims that are truly retaliatory or made in bad faith.") (internal citations omitted).

Although the Fourth Circuit has not specifically addressed the issue of whether commencing or instigating court proceedings against an employee can constitute retaliation for purposes of Title VII, this court observes that the Fourth Circuit has expressly rejected the Fifth Circuit's "ultimate employment decision" standard in retaliation cases. *Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001). As noted, two lower

courts in the Fourth Circuit have expressly held that civil or criminal proceedings can constitute prohibited retaliation. *EEOC v. Virginia Carolina Veneer Corp.; Beckham v. Grand Affair, Inc.* This court believes the Fourth Circuit would reach the same conclusion if the issue were directly presented. Accordingly, this court holds that the bringing or instigating of court proceedings may, in appropriate circumstances, give rise to a cause of action under the anti-retaliation provisions of Title VII, the ADEA, and the ADA.

C.

Even though litigation activity can constitute prohibited retaliation, this court does agree that the circumstances surrounding the challenged conduct must be carefully scrutinized so as not to deprive employers of the right to take prudent actions to protect legitimate legal interests. *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001) (explaining that although a *false* report to police that the employee was armed and laying in wait outside the plant after threatening his supervisor could be construed as a retaliatory action, a truthful report would not). Put another

way, if an employer would have been justified in bringing litigation against an employee in the absence of a discrimination charge, the mere fact that a charge has been filed should not render the action or claim discriminatory.

In the present case, the court would have to conclude that Mr. Frazier has made a *prima facie* showing of retaliation in that the contempt motion was not only brought in response to the filing of the EEOC complaint, but specifically sought to compel Mr. Frazier to withdraw it. However, the court cannot find that Mr. Frazier has forecast evidence sufficient to raise a triable issue that US Airways's proffered explanation for bringing the contempt motion was merely a pretext for discrimination.

As the Supreme Court has explained, "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993). In this case, US Airways proffers that the reason for filing the contempt motion was to protect the bankruptcy estate from what it

reasonably believed was a violation of the discharge injunction as set forth in the confirmed plan. That injunction bars "all Persons [from] commencing or continuing in any manner any Claim, action, or other proceeding of any kind with respect to any Claim . . . against Reorganized Group or any other Reorganized Debtor, which they possessed or may possess prior to the Effective Date [.] . . . ." *In re US Airways Group, Inc.*, No. 02-83984-SSM (Bankr. E.D. Va., Mar. 18, 2003), Order of Confirmation at 35; § 524(a)(2), Bankruptcy Code.

That a reorganized debtor plainly has a legitimate interest in protecting the claims allowance process from collateral attacks in other forums requires no citation of authority. The present case does, however, present a significant wrinkle in that the contempt motion was unsuccessful. As noted by this court both at the hearing on the contempt motion and in the subsequent order dismissing the motion, the claim Mr. Frazier filed with the EEOC could be given both a broad and a narrow construction. Broadly read, it would include the claims set forth in the proof of claim Mr. Frazier had filed. However, it

could also be read more narrowly to raise only post-confirmation claims of the type that the court had discussed in the memorandum opinion denying Mr. Frazier's motion seeking leave to proceed in state court. Since the EEOC charge was not narrowly drawn, there was no ready way to determine exactly what claim Mr. Frazier was attempting to pursue. The question is whether it was reasonable, in light of that ambiguity, for US Airways to fear the worst and to bring a contempt motion to ensure that the discrimination claim was tried in this court, which is where it belonged if it was a pre-confirmation rather than a post-confirmation claim.

On the issue of contempt, it is true that this court was not willing to indulge a presumption that the ambiguous discrimination charge should be read as flouting the discharge injunction. Contempt, after all, is a serious matter. At the same time, the court's comments at the hearing and in the subsequent order recognized that the EEOC charge was ambiguous in its scope and could be read as venturing into forbidden territory. Indeed, the order dismissing the motion specifically cautioned Mr. Frazier that he should not, under the

guise of prosecuting a post-confirmation claim, attempt to resurrect his pre-confirmation claim. In any event, having carefully considered the circumstances, the court is unable to find that US Airways was not, as an objective matter, justified in bringing the contempt motion.

In order to show that US Airways's proffered explanation was merely a pretext for discrimination, Mr. Frazier asserts that US Airways admitted in open court that it filed the contempt motion in order to retaliate against him. After examining the transcript of the contempt hearing, this court can find no such admission. Additionally, Mr. Frazier provides his own declaration that he was discriminated against. However, Mr. Frazier's naked opinion, without more, is not sufficient to establish even a *prima facie* case, let alone to rebut a proffered non-discriminatory explanation. *Goldberg v. Green and Co.*, 836 F.2d 845, 848 (4th Cir. 1988). Finally, Mr. Frazier relies on an EEOC finding of "reasonable cause" of retaliation to support his claim. This is likewise inadequate. *Id.* (holding that an EEOC finding was not probative because "it merely

repeats facts which [the plaintiff] himself alleges elsewhere in this case and states in conclusory fashion that those facts reflect . . . discrimination. Such findings standing alone, are not enough to salvage [plaintiff's] claim."); *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984), *cert. denied*, 469 U.S. 1041, 105 S.Ct. 525, 83 L.Ed.2d 413 (1984) (holding that EEOC findings are not sufficiently probative); *Bailey v. South Carolina Dept. of Social Services*, 851 F. Supp. 219, 221 (D.S.C. 1993) (granting summary judgment despite EEOC finding of reasonable cause).

In short, Mr. Frazier has failed to offer probative evidence that, if believed, could persuade a trier of fact that US Airways's proffered reason for filing the motion for contempt is false and that the real reason was discriminatory retaliation. For that reason, US Airways is entitled to summary judgment disallowing the retaliation claim.

III.

As an alternative basis for summary judgment, Mr. Frazier asserts that the filing of the motion for contempt also supports two state law

causes of action—namely "malicious use of process" and "intentional infliction of emotional distress."

A.

As a preliminary mater, the court must determine whether the law of Virginia (where this court sits) or the law of California (where Mr. Frazier resides and where he was served with the motion for contempt) applies. A federal bankruptcy court must apply the choice of law rules of the state in which the court sits. *In re Merritt Dredging Co.*, 839 F.2d 203, 205-06 (4th Cir. 1988). The court must therefore apply Virginia's rules on conflicts of law. Under Virginia's rules, the law of the state in which the wrongful act occurred governs, regardless of where the effects of that act are felt. *Milton v. IIT Research Institute*, 138 F.3d 519 (4th Cir. 1998). Here, the alleged wrongful act—the filing of the motion for contempt—occurred in Virginia. Accordingly, Virginia substantive law applies to the common law torts asserted in the complaint.

B.

With respect to the pleaded cause of action for "malicious use of process," Mr. Frazier has

conflated what are two distinct causes of action in Virginia, namely abuse of process and malicious prosecution. Having reviewed the allegations of the amended complaint, the court interprets it as alleging malicious prosecution rather than abuse of process, because the gist of the claim is that the motion for contempt was a groundless civil proceeding instituted against him. *See Donohoe Constr. Co. v. Mount Vernon Assoc.*, 235 Va. 531, 540, 369 S.E.2d 857, 862 (1998) ("Malicious prosecution differs from abuse of process in that malicious prosecution lies for maliciously causing process to issue while abuse of process lies for the improper use of process after it has been issued.") (internal citations omitted). To establish a *prima facie* case of malicious prosecution under Virginia law, a plaintiff must prove that (1) the defendant instituted a prior proceeding against the plaintiff; (2) the proceeding was instituted without probable cause; (3) the proceeding was instituted with malice; (4) the underlying proceeding terminated in the plaintiff's favor; and (5) the plaintiff sustained special damages as a result of the proceeding."

Tomai-Minogu v. State Farm Mut. Auto. Ins. Co., 770 F.2d 1228, 1236-37 (4th Cir. 1985).

For the reasons already discussed in connection with the retaliation claim, the court is unable to find that the contempt motion, although terminated in Mr. Frazier's favor, was brought without probable cause. As this court specifically acknowledged at the contempt hearing, Mr. Frazier's EEOC charge, while it could be read more narrowly, could also be read as including claims subject to the discharge injunction. Given the ambiguous description by Mr. Frazier of the scope of his claim, US Airways was not required to idly sit by and simply trust that only post-confirmation claims were to be prosecuted when the charge itself did not contain express language to that effect. Additionally, the malicious prosecution claim also fails because Mr. Frazier has not shown special damages, as required under Virginia law. *See, Ayyildaz v. Kidd*, 220 Va. 1080, 1084, 266 S.E.2d 108, 111 (1980) (explaining that "proof of a special loss or unusual hardship results from the malicious prosecution of the original action and [a] special injury in this procedural sense excludes the kind of

secondary consequences that are common and often unavoidable burden on defendants in all similar causes") (citation omitted). Accordingly, because Mr. Frazier has failed to forecast evidence that would establish a *prima facie* case for malicious prosecution, summary judgment disallowing that claim is appropriate.

C.

Finally, Mr. Frazier's argument that US Airways should be found liable as a matter of law for intentional infliction of emotional distress is also without merit. Because torts like intentional infliction of emotional distress may be "easily feigned without detection," the Supreme Court of Virginia has declared that such torts are "not favored" in the law. *Ruth v. Fletcher*, 237 Va. 366, 373, 377 S.E.2d 412, 415 (1989). In order to recover on a claim for intentional infliction of emotional distress, a plaintiff must establish: (1) that the wrongdoer's conduct was intentional or reckless; (2) that the conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality; (3) that the wrongdoer's conduct caused the emotional distress; and (4) that

the emotional distress is severe. *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). This tort exists only where the defendant's conduct is "so outrageous in character, and s extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Russo v. White*, 241 Va. 23, 27, 400 S.E.2d 160, 162 (1991); *see also Hatfill v. New York Times Co.*, 416 F.3d 320, 336 (4th Cir. 2005) (explaining that under Virginia law, "[i]t is not enough that the defendant acted with tortious or even criminal intent. Nor does liability extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.") (internal citations omitted). In order to prevail on such a claim, the alleged act must have an effect on the plaintiff that is so severe that no reasonable person could be expected to endure it. *See Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 269 (4th Cir. 2001).

Applying the strict analysis required by Virginia law, it is difficult to see how bringing a motion for civil contempt in ongoing litigation could be considered as rising to the level of conduct that

is so outrageous as to go beyond all possible bounds of decency. Even if the court were to find—which it cannot—that the bringing of the contempt motion was completely unjustified, the court would be unable to find that Mr. Frazier has shown "severe" distress. By its very nature, litigation frequently engenders anxiety and distress. This is not a case where Mr. Frazier was accused by US Airways of especially heinous conduct (for example, child sexual abuse or the mailing of anthrax spores) likely to make him the object of public obloquy, or where Mr. Frazier suffered imprisonment or other severe repercussions as a result of the charges being brought. While it very well may be that Mr. Frazier, as he asserts, suffered sleepless nights and depression after being served with the contempt motion, there is no evidence that his level of distress and anxiety exceeded what would be expected in any person who was charged with contempt of court. Because Mr. Frazier has not forecast evidence showing that the conduct of US Airways was outrageous, as required by Virginia law, summary judgment must be entered

disallowing his claim of intentional infliction of emotional distress.

Conclusion

In summary, Mr. Frazier's evidence is not sufficient to establish a triable issue of material fact on any of the three causes of action—illegal retaliation, malicious prosecution, or intentional infliction of emotional distress—asserted in the amended complaint. For that reason, summary judgment will be entered in favor of US Airways disallowing those claims. A separate order will e entered consistent with this opinion.

Date: Mar. 27 2006 /s/ Stephen S. Mitchell
Alexandria, Virginia Stephen S. Mitchell
US Bankruptcy Judge

Entered on Docket 3/28/2006

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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

In re:	) Case No.
US AIRWAYS, INC, et al.	) 04-13819-
Debtors	) SSM
PHILLIP H. FRAZIER	) Chapter 11
Plaintiff	) Jointly
vs.	) Adminis-
US AIRWAYS, INC.	) tered
Defendant	) Adversary
	) Proceed-
	) ing
	) No. 05-1131

ORDER DISALLOWING CLAIM NO. 3463

AND DISMISSING COMPLAINT

Upon consideration of (a) the motion for summary judgment (Doc.#21)

filed by the plaintiff and (b) the motion for summary judgment (Doc#22) filed by the defendant, and for the reasons stated in the memorandum opinion filed with is order, it is

ORDERED:

1. The plaintiff's motion for summary judgment is denied.

2. The defendant's motion for summary judgment is granted; the claims asserted in the amended complaint- reflected on the claims register as Claim No. 3463- are disallowed; and the amended complaint is dismissed.

3. The plaintiff is advised that an appeal lies from this order

to the United States District Court for the Eastern District of Virginia. Except as provided in Rules 8002(b) and (c), Federal Rules of Bankruptcy Procedure, any notice of appeal must be filed with the clerk of this court within 10 (10) days of the entry of this order. The filing fee for a notice of appeal is $255.00

4. The Clerk will mail a copy of the memorandum opinion and this order, or give electronic notice of their entry, to the parties listed below.

Date: Mar 27 2006

Aledandria, Virginia

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

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Entered on Docket: 3/28/2006

CHARGE OF DISCRIMINATION [EEOC]

California Department of Fair

Employment and Housing

and EEOC

345-2003-04359

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500 or More Employees, Members

(310) 417-0222

DISCRIMINATION BASED ON [x] RETALIATION

[AGE] [DISABILITY]

Earliest- 03-31-2003

Latest- 06-26-2003

APPENDIX 4

[CONTINUING ACTION]

PARTICULARS ARE (If additional paper is needed, attach extra sheet(s):

I have been employed by U.S. Airways since on or about April 5, 1973. I believe that I have been discriminated against because of my age (51), race (Black), disabilities and retaliated against in that:

Since on or about March 31, 2003, I have been denied a reasonable accommodation to my disabilities in that I have been denied reinstatement to my classification of Operations because the respondent requires that I have a release from my treating physician that indicates I am 100 % healed.

Since on or about March 31, 2003, and continuing I have been denied terms, conditions and privileges of employment by the Respondent because of my race, age and disabilities.

Since on or about March 31, 2003, and continuing I have been retaliated against for opposing charges illegal under Title V11 of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended and the Americans with Disabilities Act of 1990 in that my terms, conditions and privileges of employment were terminated.

I believe that I have been discriminated against in violation of Title V11 of the Civil Rights Act of 1964, as amended the Age Discrimination in

Employment Act of 1967, as amended and the Americans with Disabilities Act of 1990.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

/s/
PHILLIP H. FRAZIER

RECEIVED June 27, 2003
EFOC/LADO/SDAO

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

San Diego Area Office

401 B. Street,

Suite 510

San Diego, CA

92101

(619) 557-7235

TTY (619) 557-7235

FAX (619) 557-7274

Charge Number: 345-2003-04359

Phillip H. Frazier

222 J. Street, #426

San Diego, CA 92101 CHARGING PARTY

U.S. Airways

100 Worldway Terminal #1

Los Angeles, CA 90045 Respondent

DETERMINATION

I issue the following determination as to the merits of this charge.

Respondent is an employer within the meaning of Title V11 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq. ("Title V11"), the Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. 621 et seq. ("ADEA") and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. ("ADA") and timeliness and all other requirements for coverage have been met.

The Charging Party alleged that the Respondent engaged in employment practices made unlawful by Title V11, the ADEA and the ADA, by denying him reinstatement to his position in Operations, by terminating his benefits because of his race and age

and by denying him reasonable accommodations to his disability. Charging Party further alleges that he was subjected to retaliation with respect to terms and conditions of employment, denied reinstatement and reasonable accommodation for filing previous charges of employment discrimination with the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. Respondent denies the allegations.

Examination of the evidence reveals reasonable cause to believe that Charging Party was retaliated against based upon his protected activity in violation of Title V11, the ADEA and the ADA. No finding is made with

respect to the Charging Party's allegations of reinstatement and reasonable accommodation under the ADA or termination of benefits under the ADA, Title V11 and the ADEA. According to Section 706(b) of Title V11, the ADEA and the ADA, if the Commission determines there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful practices by informal methods of conference, conciliation and persuasion. Having determined that there is reasons to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter.

If the Respondent declines to enter into settlement discussions, or when, for any other reason, a settlement acceptable to the Director is not obtained, the Director will inform the parties in writing and advise them of the court enforcement alternatives to the Charging Party, aggrieved persons and the Commission. A Commission representative will contact you shortly to begin conciliation discussions.

On behalf of the Commission,

/S/
Bettie Isiaka, Acting Director
San Diego Area Office

7/1/04 (90)

CONCLUSION

For the reasons set forth above involving important Civil Rights laws with regards to Title V11 and related matters, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

By: /s/
PHILLIP H. FRAZIER, IN PRO SE
222 J. Street, #426
San Diego, California 92101-6825
(619) 696-6922 x 426

DATED: March 31, 2008